No. 74-1257

In the Supreme Court of the United States

OCTOBER TERM, 1974

RODOLPHE NOEL, ET AL., PETITIONERS

v.

LEONARD H. CHAPMAN, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

SHIRLEY BACCUS-LOBEL,
MICHAEL W. FARRELL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

Page

Opinions below 1
Jurisdiction 1
Questions presented 2
Constitutional provisions, statutes and regulations involved 2
Statement 3
Argument 4
Conclusion 11
Appendix 12

CITATIONS

Cases:

Diaz v. *Weinberger*, 361 F. Supp. 1, probable jurisdiction noted, 416 U.S. 980 8
Flemming v. *Nestor*, 363 U.S. 603 7
Galvan v. *Press*, 347 U.S. 522 7,10
Graham v. *Richardson*, 403 U.S. 365 8
Griffiths, In re, 413 U.S. 717 8
Harisiades v. *Shaughnessy*, 342 U.S. 580 7,10
Kleindienst v. *Mandel*, 408 U.S. 753 9
Lewis-Mota v. *Secretary of Labor*, 469 F.2d 478 11
Mow Sun Wong v. *Hampton*, 500 F.2d 1031, certiorari granted, 417 U.S. 944 8
Stanley v. *Illinois*, 405 U.S. 645 6
Sugarman v. *Dougall*, 413 U.S. 634 6,8
Texaco, Inc. v. *Federal Power Commission*, 412 F.2d 740 11

Constitution, statutes and regulation:

United States Constitution:
Article I, Section 8, clause 4 2,9
Fifth Amendment 2
Act of October 3, 1965, Sec. 21(e), 79 Stat. 921 2,5

Administrative Procedure Act, 5 U.S.C. 551, *et seq.*:
5 U.S.C. 553 10
5 U.S.C. 553(a)(1) 10
5 U.S.C. 553(b)(3)(A) 10
5 U.S.C. 701(a)(2) 10

8 U.S.C. 1151(a) 4

8 U.S.C. 1151(b) 4

8 U.S.C. 1153(a) 5

8 U.S.C. 1182(a)(14) 4,5

8 U.S.C. 1254(e) 3,5,10

8 U.S.C. 1329 10

8 C.F.R. 244.2 3,5

Miscellaneous:

H.R. 981, 93d Cong., 1st Sess. (1973) 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 508 F.2d 1023. The opinion of the district court (Pet. App. 17a-28a) is reported at 376 F. Supp. 1095.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1975. The petition for a writ of certiorari was filed on April 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Aliens who are unlawfully in this country but who marry permanent resident aliens are eligible by statute to receive visas that will allow them to live in this country legally. Another statute allows Eastern Hemisphere aliens to receive such visas under a special preference. Western Hemisphere aliens, however, must wait until a visa becomes available under the quota rules. It is the policy of the Immigration and Naturalization Service that, in the absence of exceptional circumstances, an illegal alien must leave this country until a visa authorizing his return becomes available. The questions presented are:

1. Whether this policy denies petitioners equal protection of the laws.

2. Whether this policy is invalid because it was announced without notice and opportunity to comment.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATION INVOLVED

Article I, Section 8, clause 4 of the United States Constitution provides in relevant part:

> The Congress shall have Power * * * To establish an uniform Rule of Naturalization * * *.

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The relevant portions of the Administrative Procedure Act are set out at Pet. 3-4.

Section 21(e) of the Act of October 3, 1965, 79 Stat. 921, provides in relevant part with respect to immigrants from the Western Hemisphere:

> * * * the number of special immigrants [entitled to admission for permanent residence], exlusive of special immigrants who are immediate relatives of United States citizens * * * shall not, [in any fiscal year], exceed a total of 120,000.

8 U.S.C. 1254(e) provides in relevant part:

> The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than [enumerated classes of aliens], to depart voluntarily from the United States at his own expense in lieu of deportation * * *.

8 C.F.R. 244.2 provides in relevant part:

> Authority to extend the time within which to depart * * * is within the sole jurisdiction of the district director.

STATEMENT

The facts are not in dispute and are set out in the opinion of the court of appeals (Pet. App. 2a-4a). Petitioners Rodolphe Noel and Antoine Petit are natives and citizens of Haiti. Noel was admitted to this country on May 24, 1969, as a non-immigrant visitor for pleasure and was authorized to stay for two months. He remained illegally beyond the prescribed time and was apprehended on June 15, 1972. Deportation proceedings were commenced, and at a hearing on June 27, 1972, Noel admitted that he was deportable and requested the privilege of voluntary departure in lieu of deportation. He was given until September 27, 1972, to depart voluntarily. He again failed to leave. A warrant of deportation was issued on July 12, 1973, and Noel was directed to report on August 21, 1973, to be deported. Instead of reporting, he requested an indefinite extension of voluntary departure while awaiting issuance of a visa in light of his marriage, on April 13, 1973, to petitioner Emiris Noel, a permanent resident alien. The New York district director of the Immigration and Naturalization Service (the INS) denied the request.

Petitioner Antoine Petit was admitted to the country on August 4, 1970, as a visitor for pleasure for two months. He did not depart as required and obtained employment in violation of his non-immigrant status. He was apprehended on June 7, 1973. He, too, conceded deportability and requested voluntary departure. He was given until July 8, 1973, to depart. On June 26, 1973, he married petitioner Yanick Petit, who had entered the United States a week earlier as a permanent resident immigrant. He then requested an extension of voluntary departure until a visa became available. The district director denied the request and required him to leave the country by July 27, 1973. He did not leave, and on August 6, 1973, a warrant of deportation was issued.

On August 24, 1973, petitioners brought suit in the United States District Court for the Southern District of New York seeking a declaratory judgment that the policy of INS declining to permit aliens to remain in this country pending the issuance of a visa was unconstitutional. They also sought a preliminary injunction to prohibit INS from deporting any of them. The district court denied the motion for a preliminary injunction (Pet. App. 17a-28a), and the court of appeals affirmed (Pet. App. 1a-16a).[1] The court considered and rejected the claims made here.

ARGUMENT

1. Aliens, from whatever country of origin, who are the parents, children or spouses of American citizens may enter this country without prior labor certification or numerical limitation. 8 U.S.C. 1151(a), (b) and 1182(a)(14). Similarly, aliens who are the parents, children or spouses of resident aliens and who are not from the Western Hemisphere, are exempt from the labor certification requirement (8 U.S.C. 1182(a)(14)) and, although they are subject to a quota limit of 170,000, they receive a special right of preference over others seeking a visa within that yearly quota limit (8 U.S.C. 1153(a)). As a result, they receive visas very quickly. On the other hand, Western Hemisphere aliens (such as petitioners) who are the immediate relatives of permanent resident aliens, although exempt from prior labor certification, are subject to the yearly numerical limit of 120,000 visas for permanent residence and enjoy no right of preference over others seeking visas within the same limit. Act of October 3, 1965, Sec. 21(e), 79 Stat. 921. We have been informed by INS that the current waiting period for the issuance of visas to persons in this category is approximately two years.

Since 1940 the Attorney General has had statutory discretion to permit the voluntary departure of deportable aliens (8 U.S.C. 1254(e)). The authority to grant this privilege and to set the date for departure has been delegated to district directors (8 C.F.R. 244.2). The national policy of INS has been that deportable Western Hemisphere aliens must leave and wait abroad until they become eligible for visas, even though married to a permanent resident alien. The New York district, departing from this rule, had in the past routinely granted "extended voluntary departure" pending availability of a visa.

The New York district's practice reversed to the norm in the summer of 1972 when INS informed all district directors, including the New York district director, that as of July 31, 1972, Western Hemisphere aliens should be granted extended voluntary departure only if compelling circumstances warranted the privilege.

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[1] Petitioners appealed from an order denying a preliminary injunction. The court of appeals concluded, however, that the district court's decision on the underlying legal and constitutional issues was final. It therefore treated petitioners' claims on the merits.

This statement of policy was prompted by a letter to the Commissioner of INS from Congressman Rodino, Chairman of the House Judiciary Committee, advising the Commissioner that evidence before the Subcommittee on Immigration and Nationality indicated that the employment of illegal aliens in this country was unfavorably influencing the domestic job market, and that routinely permitting deportable aliens to remain in the country pending issuance of visas was not justifiable.[2] On April 10, 1973, again in response to a letter from Congressman Rodino (Pet. App. 29a-30a), the INS provided that aliens present in the United States and who had acquired the requisite family status on or before April 10, 1973, would be allowed to remain pending visa issuance in accordance with the earlier New York practice. On the other hand, the policy was not to be applied prospectively so as to act "as an invitation to aliens to thereafter enter this country, acquire the specified relationship, and remain unlawfully" (Exh. K, p. 2, Letter of Acting INS Commissioner Greene). Petitioners' marriages took place on April 13, 1973, and June 26, 1973.

2. Petitioners' primary contention (Pet. 10) is that the policy requiring aliens from the Western Hemisphere who are illegally in this country to depart until visas become available to them cannot withstand the "close judicial scrutiny" to which classifications based on alienage are subject (*Sugarman* v. *Dougall*, 413 U.S. 634), and violates the "fundamental right" of the family to remain intact (*Stanley* v. *Illinois*, 405 U.S. 645). These arguments are insubstantial.

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[2]This letter is reprinted as an Appendix, *infra*.

The power of Congress to fix, and of the executive to enforce, "the conditions under which aliens are to be permitted to enter and remain in this country" is plenary (*Flemming* v. *Nestor*, 363 U.S. 603, 616; *Galvan* v. *Press*, 347 U.S. 522, 531), so much so that this power is "largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589. Yet here, the source of petitioners' complaint lies with acts of Congress. Congress determined that aliens married to citizens are entitled to a preference; Congress decided that Eastern Hemisphere aliens married to permanent resident aliens are entitled to a preference; Congress decided that Western Hemisphere aliens married to permanent resident aliens are not entitled to a preference. We do not think it open to doubt that Congress has the power to make such decisions.

The INS policy of which petitioners complain is a policy putting aliens who are illegally in this country on a footing similar to that of aliens who have not yet arrived; that is, the INS requires aliens to live up to the limitations on the visas by which they initially entered this country and to leave when their permitted stay has expired. As the court of appeals observed (Pet. App. 13a):

> * * * granting the relief sought would place Noel and Petit in a position of precedence over those Western Hemisphere aliens who have made application for visas in regular course and who are awaiting their turn for admission. There is no reason to prefer those who have flouted the immigration laws, which permitted their entry for a limited time and purpose, over those who have steadfastly and patiently followed legal procedures.

Petitioners have demanded, in effect, that the INS administratively provide the immigration preference that Congress has withheld. The INS has declined to provide such a preference to deportable aliens in petitioners'

position and has required such aliens to await their turn in order of preference before they can take up legitimate residence in this country. Nothing in the Constitution precludes the INS from implementing the statutes in this manner.[3]

Petitioners argue that the INS policy is unconstitutional because alienage is a "suspect" classification. But this argument fails to take account of the nature of the policy under attack. The cases cited by petitioners[4] deal with discrimination against aliens lawfully admitted for per-

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[3]It is, therefore, not necessary to explore petitioners' contention that the INS policy is irrational and not supported by compelling interests. The government argued in the district court and the court of appeals that the policy requiring deportable aliens to leave the country until they could obtain a visa was justified by the exigencies of the domestic labor market; the courts below agreed (See Pet. App. 12a). But the more fundamental justification for the INS policy is that it simply implements the policy of Congress; petitioners are complaining that the INS must advance some compelling interest not to relieve them of burdens placed upon them by Congress. We submit that an administrative agency is not required to provide reasons, compelling or otherwise, for declining to provide discretionary relief from congressional policy.

[4]*Graham* v. *Richardson*, 403 U.S. 365; *Sugarman* v. *Dougall*, *supra*; and *In re Griffiths*, 413 U.S. 717, upon which petitioners rely in demanding close judicial scrutiny of INS' policy, involved state classifications based on alienage. But federal power to act in respect to aliens is plenary, and the proposition that alienage is a "suspect" category as to federal legislative or executive action is inaccurate.

Nor do *Mow Sun Wong* v. *Hampton*, 500 F.2d 1031 (C.A. 9), certiorari granted, 417 U.S. 944, restored to the calendar for reargument, March 3, 1975, and *Diaz* v. *Weinberger*, 361 F. Supp. 1 (S.D. Fla.), probable jurisdiction noted, 416 U.S. 980, restored to the calendar for reargument, March 3, 1975, support petitioners' claim. We believe that those cases were incorrectly decided. Whether or not they were correctly decided, however, they go no further, as the court of appeals noted (Pet. App. 8a, n. 3), "than to declare that the federal and state governments cannot treat aliens legally residing in this country differently from citizens with regard to certain rights or privileges." Neither case can be controlling in regard to the power of the executive branch to deal—even at the cost of hardship to lawful residents—with aliens who are by their own admissions deportable.

manent residence; here, by contrast, there is discrimination *among* groups of individuals, *all* of whom are aliens. The policy differentiates among aliens, but does not discriminate against them. Congress' power to decide which aliens shall enter or remain in the country, individually and as groups, is undisputed and has been reaffirmed recently by this Court. *Kleindienst* v. *Mandel*, 408 U.S. 753. Petitioners, far from being lawfully admitted permanent residents, are by their own concessions deportable; they can hardly complain that Congress has used alienage as a category in carrying out its powers under Article I, Section 8, clause 4 of the Constitution to establish rules for the admission and exclusion of aliens to this country.[5]

Nor are petitioners correct in arguing (Pet. 10) that the INS has burdened the "fundamental right" of marriage. Neither INS nor Congress has imposed burdens upon marriage. The government has said no more than that aliens unlawfully within the country—whether married or not—are subject to deportation. Congress and the INS have declined to allow marriage to produce a benefit unavailable to unmarried aliens unlawfully within the country. The Constitution does not demand that marriage be the source of preferential treatment.[6]

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[5]Petitioners refer (Pet. 7) to H.R. 981, 93d Cong., 1st Sess. (1973), which would have granted preferences in the award of immigrant visas to immediate family members of both citizens and lawful resident aliens, and would thus eliminate the long wait for immigrant visas by Western Hemisphere aliens. No corresponding bill was introduced in the Senate in the 93d Congress, nor has any been introduced in the Senate in the 94th Congress.

[6]Indeed, marriage *is* a source of preferential treatment for petitioners because Western Hemisphere aliens married to permanent resident aliens are exempt from the labor certification requirements. Petitioners' complaint is that Congress and the INS did not provide the additional benefit of preference within the quota (or even exemption from the quota).

3. Petitioners contend that the INS policy is invalid because it was announced without use of the notice and comment rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. 553. Even if Section 553 is applicable to INS,[7] Section 701(a)(2) of the Act exempts from judicial review agency action that is committed to agency discretion by law. Here, 8 U.S.C. 1254(e) explicitly commits to the discretion of the Attorney General the authority to grant voluntary departure. While, as the court of appeals noted (Pet. App. 13a-14a), the district courts have jurisdiction to review exercises of INS discretion to determine whether they are arbitrary or capricious, the basis of that jurisdiction is contained in the Immigration Act (8 U.S.C. 1329), not in the Administrative Procedure Act.

At all events, Section 553(b)(3)(A) of the Administrative Procedure Act exempts "general statements of policy" from the notice requirements of Section 553. Both lower courts correctly held that the July 31, 1972, policy and the April 10, 1973, modification are within the statutory exception for general policy statements. The court of appeals reasoned (Pet. App. 15a):

> In the first place, the regulation governing the issue of extensions of time to depart which is here relevant explicitly provides that the "[a]uthority to extend the time within which to depart . . . is within the sole jurisdiction of the district director." 8 C.F.R. §244.2. The "instructions" complained of in this case do not purport to amend the published regulation or

[7]Section 553 does not apply "to the extent that there is involved * * * a military or foreign affairs function of the United States" (5 U.S.C. 553(a)(1)). As this Court has repeatedly observed, federal "[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the practical conduct of government" (*Galvan* v. *Press*, *supra*, 347 U.S. at 531), for such policies are "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government" (*Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 588-589).

> to oust the District Director of his "sole" discretion. In fact, the District Director of New York was the only INS officer who "routinely" extended the stay in the case of an alien married to a resident alien; the practice in the rest of the country was otherwise. We construe the instruction to be simply a statement by the agency of its general policy as a guideline for the District Directors. * * * One scholar has suggested that "[i]t may be that 'general statements of policy' are rules directed primarily at the staff of an agency describing how it will conduct agency discretionary functions, while other rules are directed primarily at the public in an effort to impose obligations on them." Bonfield, Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy under the APA, 23 Admin. L. Rev. 101, 115 (1970-71).

Finally, as both courts below found, the change in policy affected no "existing rights and obligations" of petitioners and therefore was not open to challenge by them. *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478, 482 (C.A. 2); *Texaco, Inc.* v. *Federal Power Commission*, 412 F.2d 740, 744 (C.A. 3). Petitioners' claim that they had "pre-existing expectations which were extinguished by administrative fiat" (Pet. 16) rings hollow in light of the fact that they were not married at the time either of the policy change or of its subsequent limited relaxation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JOHN C. KEENEY,
Acting Assistant Attorney General.

SHIRLEY BACCUS-LOBEL,
MICHAEL W. FARRELL,
Attorneys.

JUNE 1975.

APPENDIX

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20515

June 27, 1972

Honorable Raymond F. Farrell, Commissioner
Immigration and Naturalization Service
Department of Justice
119 D Street, N.E.
Washington, D.C. 20536

Dear Mr. Commissioner:

Hearings conducted by this Subcommittee over the past year in the field of immigration law enforcement have pointed up the unfavorable influence which employment by illegal aliens is having on the domestic job market. This is, of course, particularly evident in those areas of the United States having a high rate of unemployment among Americans.

With this in mind, the Subcommittee believes that the Service practice of routinely permitting alien professionals and certain natives of the Western Hemisphere to remain in the United States until their visa priority dates are reached is no longer justifiable. These non-resident aliens and their dependents are competing for jobs when unemployed residents of the United States, and their numbers should not be allowed to increase further. The Subcommittee therefore recommends that this practice be terminated immediately, but that those aliens who have already been granted permission to remain pending visa availability be allowed to stay if they maintain the qualifications on which the privilege was given originally.

The Subcommittee is of the opinion that existing provisions of the Immigration and Nationality Act, particularly section 101(a)(15)(H)(i), are sufficient to provide for the admission of professionals to the United States to fill those positions which cannot be filled by United States residents.

Kindest regards.

Sincerely,

Peter W. Rodino, Jr.
Chairman